No. 80-975

In the Supreme Court of the United States

OCTOBER TERM, 1980

FEDERATION FOR AMERICAN IMMIGRATION REFORM, ET AL., PETITIONERS

v.

MALCOLM BALDRIGE, SECRETARY OF COMMERCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners lack standing to contest the inclusion of "illegal aliens" in the 1980 decennial census count.

2. Whether the constitutional provision that Representatives shall be apportioned among the states based on "the whole number of persons in each State" requires the Census Bureau to identify and exclude "illegal aliens" from the census count.

3. Whether a challenge to the manner in which the decennial census is conducted must be heard by a three-judge district court pursuant to 28 U.S.C. 2284(a).

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a) is unreported. The opinion of the district court (Pet. App. 4a-31a) is reported at 486 F. Supp. 564.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a) was entered on November 6, 1980. The petition for a writ of certiorari was filed on December 15, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 2, Clause 3 of the Constitution provides in pertinent part:

> The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct.

Fourteenth Amendment, Section 2 of the Constitution provides in pertinent part:

> Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.

Section 141(a) of the Census Act, 13 U.S.C. 141(a), provides in pertinent part:

> The Secretary shall, in the year 1980 and every ten years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the "decennial census date," in such form and content as he may determine * * *.

28 U.S.C. 2284(a) provides:

> A district court of three judges shall be convened when otherwise required by Act of Congress, or when an

action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.

STATEMENT

1. Article I, Section 2, Clause 3 of the Constitution, as amended by Section 2 of the Fourteenth Amendment, mandates that the members of the House of Representatives "be apportioned among the several States * * * according to their respective Numbers, which shall be determined * * * every subsequent Term of ten Years, in such Manner as [Congress] shall by law direct." Pursuant to this authority, Congress directed the Secretary of Commerce (through the Bureau of the Census) to conduct a census of the population on April 1, 1980. See 13 U.S.C. 141(a). In accordance with prior practice, the Bureau has attempted to count all persons residing in each state, without regard to the lawfulness of their presence in this country. On December 31, 1980, following completion of the 1980 decennial census, the Secretary certified the state population totals to the President, as required by 13 U.S.C. 141(b). See *Klutznick* v. *Carey*, No. A-567 (Dec. 30, 1980); *Klutznick* v. *Young*, No. A-533 (Dec. 24, 1980) (Stewart, Circuit Justice).

More than two years prior to the commencement of the 1980 census, the Secretary submitted reports to Congress containing the Bureau's determination of the subjects proposed to be included, and the types of information to be compiled, in the census. See 13 U.S.C. 141(f). These submissions made clear that the Bureau intended to count every person residing in a state, including illegal aliens (Pet. App. 29a). Nonetheless, petitioners did not file this suit until December 5, 1979, less than four months prior to the com-

mencement of the 1980 census.[1] Petitioners sought declaratory and injunctive relief, claiming that, insofar as the Bureau proposed to count illegal as well as legal aliens, the 1980 census would violate the Constitution, the Census Act, 13 U.S.C. 1 *et seq.*, and the Administrative Procedure Act, 5 U.S.C. 706(2). Petitioners argued that the unlawful inclusion of illegal aliens in the census count would inflate the population of those urban areas and states that have high concentrations of illegal aliens. According to petitioners, the 1980 census would thus result in the malapportionment of an unknown number of congressional seats and also state legislatures that base their apportionment on the census. In addition, petitioners contended that those states and localities with relatively small populations of illegal aliens would lose an unknown amount of federal money, because numerous federal programs allocate funds according to the census figures. Petitioners requested that a three-judge court be convened to consider their claims. See 28 U.S.C. 2284(a).

2. a. Both sides moved for summary judgment, and on February 26, 1980, a three-judge district court granted the government's motion for summary judgment, dismissed petitioners' complaint, and dissolved the three-judge court. The court first concluded (Pet. App. 10a-24a) that petitioners lacked standing to challenge the manner in which the Bureau of Census proposed to conduct the 1980 census. The court found that, even assuming that illegal aliens should not be counted in the census, it is not possible, given the uncertainties of the general population shifts and the size and location of the illegal alien population, to ascertain which, if any, of the individual petitioners would suffer a loss in representation as a result of the census (*id.* at 14a).

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[1]Petitioners are the Federation for American Immigration Reform, the Committee for Representative Government, and 26 current or former federal legislators.

Because none of the petitioners could "allege that the weight of his or her vote in the next decade [*would*] *be affected* by the expected method of taking the census and apportioning congressional seats" (*ibid.*; emphasis in original), petitioners failed to demonstrate a concrete injury in fact (*id.* at 14a-20a).[2]

The court held that petitioners lacked standing for still another reason. Citing *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 75 (1978), the court stated that petitioners had failed to show that "the relief they seek will redress the injury they assert" (Pet. App. 21a). The court pointed out that the Bureau has no reliable method of calculating the number of illegal aliens and that one of the methods proposed by petitioners, when applied to the 1970 census results, produced a total illegal alien population of *minus* 623,000 (*ibid.*). The court also noted that, in light of the complexity of the immigration laws, it was virtually impossible to define "illegal alien" for census purposes (*id.* at 21a-22a n.12). Moreover, the court recognized that because even the latest census techniques may result in the underreporting of lawful aliens and minority groups, the counting of illegal aliens might not in any event result in malapportionment (*id.* at 22a). The court concluded that (*ibid.*):

> In that event, this court will have decided a constitutional issue, ordered the expenditure of millions of dollars and caused substantial delay in the taking of the census, all with absolutely no effect on the [petitioners'] voting rights. Our jurisdiction may not rest on so ephemeral a possibility of relief.

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[2]The court also stated (Pet. App. 13a n.9) that petitioners certainly had no standing to present a "blunderbuss attack" on Congress' decision to use the census (including illegal aliens) in allocating federal funds.

b. The district court also indicated (Pet. App. 25a-29a) that, even if they had standing, petitioners would not be entitled to equitable relief. The court concluded that the public interest in permitting the census to go forward substantially outweighed petitioners' "eleventh hour" claim of irreparable harm (*id.* at 29a). In addition, the court observed that "[petitioners'] case appears to be very weak on the merits" (*id.* at 26a). The court explained that the all-inclusive language[3] and the history of the Constitution show that illegal aliens are to be counted in the census. In particular, the court relied on the fact that the Congress that proposed the Fourteenth Amendment and subsequent Congresses have assumed that the census includes all aliens (*id.* at 26a-27a). The court also noted that for two hundred years the Bureau and its predecessors have attempted to count every resident, including illegal aliens and numerous other groups (such as women, convicts, and the insane), who at one time or another have been disfranchised or otherwise legally disabled (*id.* at 26a).

c. Finally, the district court decided that there was no basis for convening a three-judge district court and that petitioners' claim should have been considered by a single district judge. The court explained that 28 U.S.C. 2284(a) requires a three-judge district court only "when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body." Looking to the language and legislative history of the statute, the court found that an action challenging census practices is not an apportionment

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[3]Section 2 of the Fourteenth Amendment, which supplanted in part the apportionment provision of Article I, provides that the census shall include "the whole number of persons in each State."

case within the meaning of 28 U.S.C. 2284(a). See Pet. App. 29a-30a.[4] Accordingly, the court ordered the three-judge court dissolved.

3. Petitioners filed a direct appeal to this Court, alleging jurisdiction under 28 U.S.C. 1253, and also appealed to the court of appeals, which stayed its proceedings pending this Court's disposition of petitioners' direct appeal. On March 17, 1980, the Court denied petitioners' application for a stay of the census pending appeal (No. A-747), and on June 16, 1980, the Court dismissed petitioners' appeal (No. 79-1588). Subsequently, the court of appeals summarily affirmed the judgment of the district court (Pet. App. 1a).

ARGUMENT

The decision of the court of appeals is correct, and it does not conflict with any decision of this Court or of any court of appeals. Particularly in light of petitioners' failure to raise their challenge to the 1980 census until the eleventh hour and the fact that the census has now been completed and the results certified to Congress, further review of petitioners' speculative and novel claims is unwarranted.

1. Petitioners contend (Pet. 10-16) that they have standing to challenge the Census Bureau's determination to include all resident aliens in the 1980 decennial census. Even assuming that illegal aliens should be excluded from the census, however (but see pages 10-12, *infra*), the courts below correctly concluded that petitioners have failed to allege sufficient injury in fact to invoke the jurisdiction of the federal courts (Pet. App. 10a-20a, 1a). No petitioner has alleged that the exclusion of resident illegal aliens from the

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[4]In order to expedite the litigation and out of an abundance of caution, Judge Gasch specifically certified that he agreed with the conclusions of the three-judge court. See *Swift & Co.* v. *Wickham*, 382 U.S. 111, 114 n.4 (1965). Subsequently, on February 29, 1980, Judge Gasch denied petitioners' request for an injunction pending appeal.

decennial enumeration will necessarily or even likely affect the weight of his vote in the next decade. Rather, petitioners allege only that one or more lawful residents of this country might be disadvantaged with regard to the relative voting strength of other lawful residents within and among the various states. Such undifferentiated and speculative injuries fall far short of establishing injury in fact within the scope of Article III. See, *e.g.*, *Warth* v. *Seldin*, 422 U.S. 490, 502 (1975); *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208, 217-220 (1974); *O'Shea* v. *Littleton*, 414 U.S. 488, 493-499 (1974); *Daughtrey* v. *Carter*, 584 F. 2d 1050, 1056-1057 (D.C. Cir. 1978) (no standing to challenge voting by illegal aliens); *Sharrow* v. *Brown*, 447 F. 2d 94 (2d Cir. 1971), cert. denied, 405 U.S. 968 (1972) (no standing to challenge census); *Lampkin* v. *Connor*, 239 F. Supp. 757, 760-763 (D.D.C. 1965) (no standing to challenge census), aff'd on other grounds, 360 F. 2d 505 (D.C. Cir. 1966).[5]

Petitioners suggest (Pet. 11-12) that it is inevitable that California would lose a seat in Congress if illegal aliens were excluded from the census and that therefore lawful residents outside of California, who include at least one petitioner or one of petitioner FAIR's members, would necessarily enjoy an increase in relative representation in Congress. At the outset, we note that the actual census results undermine the factual premise of petitioners' contention.[6] More

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[5] *Baker* v. *Carr*, 369 U.S. 186 (1962), on which petitioners rely, is not to the contrary. In that case, the plaintiffs were residents of populous districts who could demonstrate with certainty that the state's unequal districting was actually diminishing their voting rights. Here, in contrast, no petitioner has alleged a quantifiable, non-speculative injury.

[6] The actual 1980 census results show that the Bureau counted approximately 226.5 million persons. The April 1, 1980, demographic estimate of national population, which does *not* include any estimate of the number of undocumented aliens residing in the country at that time,

important, even if California would lose a seat in Congress if illegal aliens were somehow excluded from the census count, petitioners cannot state which of their members would in fact gain relatively increased congressional representation. Nor can petitioners allege standing as a group merely by combining their speculative individual claims. See *Schlesinger* v. *Reservists Committee to Stop the War, supra,* 418 U.S. at 217-220; *Sierra Club* v. *Morton,* 405 U.S. 727, 738-740 (1972).[7]

Furthermore, as the courts below concluded (Pet. App. 21a-23a), petitioners also lack standing because they have failed to demonstrate that the allegedly improper inclusion of illegal aliens in the census is a redressable injury. In

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is 226 million. Thus, the Bureau actually counted a relatively small number of unlawful aliens nationwide while reducing the undercount experienced in previous censuses, or it counted a larger but unknown number of illegal aliens while missing some lawful residents. In either event, it is highly speculative whether any theoretical statistical adjustment for a relatively small number of persons scattered throughout the country would cause California or any other state to lose a seat in Congress. At a minimum, no petitioner can allege with particularity that his voting strength will be increased if illegal aliens are discounted.

[7]We further note that regardless of whether illegal aliens are properly included in the census, voting representation among districts will vary greatly. Because congressional districts do not cross state lines, there is an inevitable and substantial disparity in size among congressional districts in different states. For example, under the 1970 census, South Dakota, which had a population of 666,257, had two representatives in Congress, whereas North Dakota, which had a population of 617,761, had only one representative. In addition, districts will differ as to the percentage of non-voting, lawful residents, such as the underaged, the prison population, and number of lawful aliens.

belatedly challenging the census, petitioners did not propose any statistically defensible method of estimating the number or location of unlawful aliens in the country. See *id.* at 8a n.6, 21a-22a. In fact, application of one of petitioners' proposed formulas to the 1970 census produced the absurd result that there were *minus* 623,000 illegal aliens in the country at that time. *Id.* at 21a. Nor would conducting a new census aid petitioners' cause. Determination of who is an illegal alien is a formidable task, involving application and interpretation of complex provisions of the immigration laws and often requiring a full evidentiary hearing. See 8 U.S.C. 1251-1258. Cf. *Mathews* v. *Diaz*, 426 U.S. 67, 79-80 n.13 (1976). Moreover, there is no reason to believe that a census form requesting that illegal aliens identify themselves as such would be accurately answered. On the other hand, any effort to identify "illegal" aliens would seriously hamper the Bureau's attempts to obtain an accurate count of certain lawful resident minority groups. In sum, there is no " 'substantial likelihood' that the relief requested will redress the injury claimed * * *." *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 75 n.20 (1978). See also *Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 262 (1977); *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38 (1976); *Warth* v. *Seldin, supra*, 422 U.S. at 504; *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 618 (1973).[8]

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[8]The lower courts correctly declined to consider petitioners' "blunderbuss" attack on the use of census results in the distribution of federal funds. See Pet. App. 13a n.9; Pet. 16-17. Congress may disburse such funds in any manner it chooses, so long as the method bears a rational relationship to the purpose of the statute. Thus, even if the Bureau should not have counted illegal aliens for apportionment purposes, it does not follow that Congress could not distribute educational funds, for example, on the basis of total population, including illegal aliens. In any event, petitioners are required to challenge the use of total population figures in the context of a particular program and do not have

2. Even if petitioners' untimely challenge to the census process sufficiently alleges standing, petitioners' claim (Pet. 7-10) that the Bureau improperly included illegal aliens in the enumeration process is without merit. Article I, Section 2, Clause 3 of the Constitution broadly provides that the census includes the "whole Number of free Persons" in each state, except for untaxed Indians and slaves.[9] Thus, as petitioners concede (Pet. 8), the literal language of the Constitution mandates that illegal aliens residing in each state be counted in the census. In addition, as the district court pointed out (Pet. App. 26a), the fact that the Framers specifically excepted two groups from the scope of the Census Clause strongly supports the conclusion that all other persons, including aliens, fall within the inclusive language of the provision. To be sure, there were no illegal aliens at the time the Constitution was written. But the Constitution itself authorized Congress to enact laws concerning immigration and naturalization (art. I, § 8, cl. 4), and the constitutional debates make clear that Congress was to be apportioned "by the number of the State's *inhabitants.*" *Wesberry* v. *Sanders*, 376 U.S. 1, 13 (1964) (emphasis supplied). See *The Federalist* No. 54, at 369 (J. Cooke ed. 1961).

Moreover, the history and language of the Fourteenth Amendment squarely refute petitioners' contentions. This Court has repeatedly concluded that an illegal alien is a "person" within the ambit of Section 1 of the Fourteenth Amendment (see, *e.g.*, *Mathews* v. *Diaz*, *supra*, 426 U.S. at 77; *Wong Wing* v. *United States*, 163 U.S. 228, 238

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standing to challenge the census itself because one of them might be injured by Congress' improper reliance on total population figures in distributing certain federal funds. Cf. *Simon* v. *Eastern Kentucky Welfare Rights Org.*, *supra*.

[9]Slaves were to be counted as three-fifths of a person. Of course, that portion of Article I was repealed by Section 2 of the Fourteenth Amendment.

(1896); *Yick Wo* v. *Hopkins*, 118 U.S. 356, 369 (1886)), and petitioners suggest no reason why an illegal alien should be considered a "person" for purposes of Section 1 of the Fourteenth Amendment but not for Section 2. See also *United States* v. *Otherson*, Nos. 80-1202 & 80-1203 (9th Cir. Nov. 6, 1980), slip op. 900-906.[10] To the contrary, the congressional debates show that Congress purposefully adopted the inclusive phrase "whole number of persons in each State" while specifically rejecting more restrictive alternatives such as "citizens" or "voters." See Cong. Globe, 39th Cong., 1st Sess. 9-10, 141, 359, 535, 2804 (1865-1866); Pet. App. 26a-27a. For example, Representative Conkling observed that the exclusion of aliens from the apportionment base would "cause considerable inequalities * * *, because the number of aliens in some States is very large." Cong. Globe, 39th Cong., 1st Sess. 359 (1866).

Petitioners also ignore two hundred years of consistent administrative practice. The Bureau of the Census and its predecessors have always counted all inhabitants in the United States, regardless of whether they are mental incompetents, convicts, illegal aliens, or otherwise legally disabled persons. See Pet. App. 26a. Congress has repeatedly approved this settled methodology, particularly with regard to persons "in this country in violation of law." 86 Cong. Rec. 4372 (1940) (colloquy between Reps. Rankin and Celler). See, *e.g.*, 71 Cong. Rec. 1821-1822 (1929) (remarks of Sen. Vandenberg); *Hearings on H.J. Res. 20,*

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[10] *Burns* v. *Richardson*, 384 U.S. 73 (1966), is not to the contrary. In *Burns*, the Court merely concluded that a *state* may apportion its legislature on the basis of registered voters so long as the resulting "distribution of legislators [is] not substantially different from that which would have resulted from the use of a permissible population basis." *Id.* at 93. The Court did not purport to address who must be counted in the *federal* census—a process that it had previously described as an effort to ascertain "the number of the State's *inhabitants*." *Wesberry* v. *Sanders*, *supra*, 376 U.S. at 13.

101, 356, and 484 Before the House Comm. on the Judiciary, 71st Cong., 3d Sess. (Serial 16) 27 (1931); 86 Cong. Rec. 4371-4372 (1940). In fact, Congress held extensive hearings regarding the 1980 census and was fully aware that the Bureau intended to count all persons, including all resident aliens, without inquiring into an alien's immigration status. See, *e.g.*, *Economic and Social Statistics for Spanish-Speaking Americans: Hearings on H.J. Res. 406 Before the Subcomm. on Census and Statistics of the House Comm. on Post Office and Civil Service*, 93d Cong., 2d Sess. 23-25, 33, 35, 82-83 (1974); *The Census Undercount Problem: Hearing Before the Subcomm. on Commerce, Consumer, and Monetary Affairs of the House Comm. on Government Operations*, 96th Cong., 1st Sess. 19, 23-25, 29-31 (1979).

3. Finally, petitioners renew their claim that this case was appropriately heard by a three-judge court pursuant to 28 U.S.C. 2284(a). In a case of first impression (Pet. 20), the courts below correctly concluded that petitioners' suit does not constitute "an action * * * challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body." 28 U.S.C. 2284(a). See Pet. App. 29a-30a, 1a. Petitioners do not challenge any actual apportionment; rather, they contest certain census practices that might affect the allocation of congressional seats among the states and, ultimately, the apportionment of congressional and state legislative districts. Such an indirect attack on future apportionment does not satisfy the narrow terms of Section 2284(a). See S. Rep. No. 94-204, 94th Cong., 1st Sess. 12 (1975); S. Rep. No. 93-206, 93d Cong., 1st Sess. 13 (1973). See also *Gonzalez* v. *Automatic Employees Credit Union*, 419 U.S. 90, 97-98 (1974). Indeed, even prior to the amendment of the three-judge court provisions in 1976, which were designed

to limit the number of cases heard by such tribunals, challenges to census practices were routinely heard by single-judge district courts. See, *e.g.*, *Borough of Bethel Park* v. *Stans*, 319 F. Supp. 971 (W.D. Pa. 1970), aff'd, 449 F. 2d 575 (3d Cir. 1971); *Sharrow* v. *Brown*, 319 F. Supp. 1012 (S.D.N.Y. 1970), aff'd, 447 F. 2d 94 (2d Cir. 1971), cert. denied, 405 U.S. 968 (1972); *Quon* v. *Stans*, 309 F. Supp. 604 (N.D. Cal. 1970); *Lampkin* v. *Connor*, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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